United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1902.

No. 1167. 129

THOMAS BLAGDEN, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, TO THE USE OF EUGENE R. PREINKERT, JOHN L. PREINKERT, INFANTS, BY JOB BARNARD, THEIR GUARDIAN, AND CHARLOTTE I. PREINKERT, CLARA E. PREINKERT, INFANTS, BY CHARLOTTE PREINKERT, THEIR GUARDIAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 13, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1902.

No. 1167.

THOMAS BLAGDEN, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, TO THE USE OF EUGENE R. PREINKERT, JOHN L. PREINKERT, INFANTS, BY JOB BARNARD, THEIR GUARDIAN, AND CHARLOTTE I. PREINKERT, CLARA E. PREINKERT, INFANTS, BY CHARLOTTE PREINKERT, THEIR GUARDIAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1902.

In the Court of Appeals of the District of Columbia.

THOMAS BLAGDEN, Appellant,
vs.
THE UNITED STATES OF AMERICA, to the Use of EUGENE R. Preinkert *et al.* } No. 1167.

a Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiff,
vs.
JOHN TAYLOR, THOMAS BLAGDEN, and George W. White, Defendants. } At Law. No. 43551.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Dec. 19, 1899.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiff,
vs.
JOHN TAYLOR, THOMAS BLAGDEN, and George W. White, Defendants. } At Law. No. 43551.

1. The plaintiff, The United States of America, for the use of Eugene R. Preinkert and John L. Preinkert, infants, by Job Barnard, their guardian; Charlotte I. Preinkert and Clara E. Prein-

kert, infants, by Charlotte Preinkert, their guardian, distributees of the estate of James Taylor, deceased, sue- the defendants John Taylor, as principal, and Thomas Blagden and George W. White, as sureties, for money payable by the defendants to the plaintiff; for that the said defendants, on the 19th day of March, A. D. 1897, by their certain writing obligatory, sealed with their seals (a certified copy of which, under the hand and seal of the register of wills for the District of Columbia, is now here shown to the court), the date whereof is a certain day and year above mentioned, to wit, the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the plaintiff, The United States of America, in the full sum of fifteen thousand dollars ($15,000), current money of
2 said States; the condition of said writing obligatory was such that if the defendant John Taylor, executor of the last will and testament of James Taylor, deceased, late of the District of Columbia, should well and truly perform the said office of executor according to law and should in all respects discharge the duty of him required by law as executor aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the said obligation should be void; it was otherwise to be in full force and virtue in law; and the plaintiff says that the said executor, the defendant John Taylor, did not perform the conditions of said writing obligatory, but therein wholly failed and made default, to the great damage and injury of the plaintiff, to wit, of the sum of fifteen thousand dollars ($15,000); that although, under the orders of this court, holding a special term for orphans' court business, the said defendant, John Taylor, as such executor, exhibited and filed his second and final account in said court, which was duly approved and passed by said court, holding said special term for orphans' court business, on the 27th day of January, A. D. 1899, yet he, the said defendant, John Taylor, has wholly neglected and refused, and still neglects and refuses, to pay to the plaintiff for the use of said infants, Eugene R. Preinkert, John L. Preinkert, Charlotte I. Preinkert, and Clara E. Preinkert, the several sums distributed to them by his said account, to wit, the sum of four hundred and sixty-six dollars and ninety-nine cents ($466.99) each, making the sum of eighteen hundred and sixty-seven dollars and ninety-six cents ($1,867.96) in all, with interest from the said 27th day of January, A. D. 1899; by reason whereof the plaintiff
3 has become entitled to have and receive from the said defendants, John Taylor, Thomas Blagden, and George W. White, the full sum of fifteen thousand dollars ($15,000).

And the plaintiff claims the full sum of eighteen hundred and sixty-seven dollars and ninety-six cents ($1,867.96), with interest, at the rate of six per centum perannum, from the 27th day of January, A. D. 1899, less the sum of one hundred and fifty dollars and ninety cents ($150.90) paid April 4th, 1899; the sum of one hundred dollars ($100) paid June 13th, 1899, and the sum of thirty-six dollars ($36) paid September 20th, 1899, besides the costs of this suit.

BARNARD & JOHNSON,
Attorneys for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

BARNARD & JOHNSON,
Attorneys for Plaintiff.

4 *Amended Pleas of Thomas Blagden.*

Filed Feb. 8, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert *et al.*, Plaintiffs,
vs.
JOHN TAYLOR ET AL., Defendants.
} At Law. No. 43551.

For amended pleas to the plaintiff's declaration the defendant Thomas Blagden says:

(1.) That the defendant John Taylor, executor of James Taylor, as in said declaration averred, did not as such executor exhibit and file his second and final account in the supreme court of the District of Columbia, holding a special term for orphans' court business, in manner and form as in said declaration is alleged.

(2.) And the said defendant, leave of the court to that effect had, for a second plea to the said declaration says that the said defendant, John Taylor, as executor of James Taylor aforesaid, did on the 27th day of January, 1899, in the District aforesaid, pay to the plaintiff, for the use of the said infant defendants, the sum of $1,867.96, in full discharge and satisfaction of all sums due from him, the said John Taylor, executor, to the said infant defendants.

WM. STONE ABERT,
R. ROSS PERRY AND SON,
Attorneys for the Defendant Thomas Blagden.

5 *Joinder of Issue, &c.*

Filed Feb. 20, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert *et al.*, Pl't'f,
vs.
JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Def'ts.
} No. 43551. At Law.

Now comes the plaintiff and joins issue with the defendants Thomas Blagden and George W. White upon their several amended pleas filed herein.

BARNARD & JOHNSON,
Attorneys for Plaintiff.

Notice of Trial.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert *et al.*, Pl't'f, *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Def'ts.	No. 43551. At Law, Docket 47.

To Wm. Stone Abert and R. Ross Perry & Son and Robert E. L. White, attorneys for defendants:

Take notice that the issue joined in this cause will be tried at the next term of this court.

BARNARD & JOHNSON,
Attorneys for Plaintiff.

6 Supreme Court of the District of Columbia.

TUESDAY, *October* 15*th*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiffs, *vs.* THOMAS BLAGDEN and GEORGE W. WHITE, Defendants.	No. 43551. At Law.

Come again the parties aforesaid in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, upon their oath say they find the issue herein in favor of the plaintiffs, and that the money payable by said defendants to said plaintiffs by reason of the premises is the sum of eighteen hundred and sixty-seven dollars and ninety-six cents ($1,867.96), with interest, at the rate of six per centum per annum, from the 27th day of January, A. D. 1899, less the sum of one hundred and fifty dollars and ninety cents ($150.90) paid April 4th, 1899; the sum of one hundred ($100.00) dollars paid June 13th, 1899, and the sum of thirty-six ($36) dollars paid September 20th, 1899.

7 *Motion for New Trial.*

Filed Oct. 17, 1901.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert *et al.* *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Defendants.	Law.	No. 43551.

And now come the said defendants, Thomas Blagden and George W. White, by their attorneys, and move the court to set aside the verdict in this cause and grant them a new trial upon the following grounds:

1st. Because of errors of law committed by the justice presiding at the trial in his rulings in admitting testimony.

2d. Because of error of law committed by the presiding justice in refusing to grant the motion made by these defendants at the close of plaintiff's testimony—to instruct the jury to render a verdict in favor of said defendants, Thomas Blagden and George W. White.

3. Because of errors of law in the rulings of the presiding justice at the trial of the case on exceptions reserved by said defendants during the progress of the trial and entered on the minutes of said justice.

WM. STONE ABERT,
Attorney for Thomas Blagden and George W. White, Defendants.

8 Supreme Court of the District of Columbia.

FRIDAY, *November 8th*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiffs, *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Defendants.	No. 43551.	At Law.

Come again the parties herein, by their respective attorneys, and upon hearing defendants' motion for a new trial herein, it is considered that the same be, and it is hereby, ordered overruled and

judgment on verdict is ordered ; therefore it is considered that the plaintiffs recover against the defendants Thomas Blagden and George W. White the penalty of the bond sued on herein, to wit, $15,000.00, said bond to be released, however, upon the payment of the sum of one thousand eight hundred and sixty-seven dollars and ninety-six cents, with interest thereon, at the rate of six (6%) per centum per annum, from the 27th day of January, 1899, less the credit of $150.00 paid April 4th, 1899 ; the further credit of $100.00 paid on the 13th day of June, 1899, and a further credit of $36.00 paid on the 20th day of September, 1899, the money in manner found due and
9 payable by said defendants to said plaintiffs by reason of the premises, together with their costs of suit, to be taxed by the clerk, and have execution thereof.

Supreme Court of the District of Columbia.

MONDAY, *December* 2*d*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiffs, *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Defendants.	No. 43551.	At law.

Upon consideration of defendant's motion herein for a severance, it is ordered that said Thomas Blagden be granted a severance from the other defendants on his appeal from the judgment rendered herein November 8th, 1901, to the Court of Appeals of the District of Columbia, and a supersedeas bond is fixed in the sum of twenty-five hundred ($2,500) dollars and approved.

10 *Order for Appeal and Citation.*

Filed Dec. 2, 1901.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, by Charlotte Preinkert, Their Guardian, Plaintiffs,
vs.
JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Defendants.
} At Law. No. 43551.

The clerk of said court will please enter an appeal to the Court of Appeals of the District of Columbia on behalf of the said defendant Thomas Blagden from the judgment of said supreme court rendered herein on the 8th day of November, A. D. 1901, and issue citation to the above-named plaintiffs, the said Blagden having by said supreme court been granted a severance in said appeal from the other codefendants.

WM. STONE ABERT,
Attorney for the Defendant Thomas Blagden.

11 In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian,
vs.
JOHN TAYLOR, THOMAS BLAGDEN, and George W. White.
} At Law. No. 43551.

The President of the United States to The United States of America, to use of Eugene R. Preinkert, John L. Preinkert, infants, by Job Barnard, their guardian, and Charlotte I. Preinkert, Clara E. Preinkert, infants, by Charlotte Preinkert, their guardian, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal noted in the clerk's office of the supreme court of the District of Columbia on the 2nd day of December, 1901,

wherein Thomas Blagden is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 2nd day of December, in the year of our Lord one thousand nine hundred and one (1901).

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 2nd day of December, 1901.

BARNARD & JOHNSON,
Attorneys for Appellee.

12 *Memorandum.*

December 2, 1901.—Appeal bond filed.

Supreme Court of the District of Columbia.

FRIDAY, *December 20th*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Their Guardian, Plaintiffs, *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and George W. White, Defendants.	No. 43551. At Law.

Now again comes here the defendant Thomas Blagden, by his attorney, and tenders to the court his bill of exceptions taken during the trial of this cause, and prays that it may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

13 *Bill of Exceptions.*

Filed Dec. 20, 1901.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiffs,
vs.
JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Defendants.
} At Law. No. 43551.

At the trial of this case the plaintiffs, in order to maintain the issues upon their part joined, gave evidence to the jury tending to prove the following facts:

A certified copy of the bond sued on was offered in evidence, to wit:

Bond Sued on.

Filed January 11, 1901.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

Know all men by these presents that we, John Taylor, Thomas Blagden, and George W. White, of the District of Columbia aforesaid, are held and firmly bound unto the United States of America in the full sum of fifteen thousand dollars, current money of said States, to be paid to the said United States, their certain attorneys or assigns; to which payment, well and truly to be made, we
14 bind ourselves and each of us, our and each of our heirs, executors, and administrators, in and for the whole, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of March, in the year of our Lord one thousand eight hundred and ninety seven.

Whereas the above-bounden John Taylor is about taking out from the supreme court of the District of Columbia letters testamentary on the personal estate of James Taylor, late of the District of Columbia, deceased:

The condition of the above obligation is such that if the above-bounden John Taylor shall well and truly perform the office of executor of James Taylor, late of the District of Columbia, deceased, according to law, and shall in all respects discharge the duty of him required by law as executor aforesaid, without any injury or damage to any person interested in the faithful performance of

said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

JOHN TAYLOR. [SEAL.]
THOS. BLAGDEN. [SEAL.]
GEO. W. WHITE. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. S. HARKNESS.

Approved:
A. B. HAGNER.

DISTRICT OF COLUMBIA, *To wit:*

I, John Taylor, do swear that I will well and truly administer the goods, chattels, personal estate, and credits of James Taylor, late of the District of Columbia, deceased, to the best of my
15 knowledge, according to law, and will give a just account of my administration when thereto I shall be lawfully called, so help me God.

JOHN TAYLOR.

Sworn and subscribed before me this 19th day of March, A. D. 1897.

Test: J. NOTA McGILL,
Register of Wills.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

(Stamp.)

DISTRICT OF COLUMBIA, *To wit:*

OFFICE OF THE REGISTER OF WILLS.

I hereby certify that the aforegoing is a true copy of the original bond of said John Taylor, executor of James Taylor, deceased, filed and recorded in the office of the register of wills for the District of Columbia.

Witness my hand and the seal of the supreme court of the District of Columbia, special term for orphans' court business, this 10th day of January, A. D. 1901.

[SEAL.] JOHN R. ROUZER,
Acting Register of Wills, District of Columbia.

The plaintiffs thereupon offered in evidence the original second and final account of said John Taylor, executor, and the record thereof, as the same appears in Liber No. 41, J. N. McG., folio 116, one of the records of the office of the register of wills for said District; to which offers the defendant Blagden, by his counsel, objected because said evidence was and is incompetent, irrele-
16 vant, and inadmissible, and because there is no proof that demand of payment was ever made of the defendant

Blagden or said defendants upon said account or upon a copy thereof attested by the clerk, and no proof of the defendants or said Blagden having notice of plaintiffs' said account or demand given him or them, or left at his or their last place of abode, and no proof of a copy of the said account, debt, or demand attested by the clerk was ever given to said Blagden or said defendants. The court thereupon overruled said objections; to which ruling of the court the defendant Blagden, by his counsel, then and there excepted.

Said account was then read in evidence, viz:

17 No. 7692. Adm'n Doc. 23.

Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

Second and final account of John Taylor, executor under the last will and testament of James Taylor, deceased, rendered in conformity with a decree of the equity court, passed January 3, 1899; case No. 19387.

		He charges himself with the balance as shown by his first account, approved and passed Nov. 25, 1898, and recorded in Accounts No. 40, J. N. McG., folio 428			$5,747.47
		He also charges himself with the following collection since the approving and passing of said first account:			
1899. Jan'y 14.		Collected from George F. Soter			542.82
					$6,290.29
1899. Jan'y 16.		He claims credit and allowance for the following: By paid Clayton E. Emig, attorney, services in collecting the Soter debt above recited, and costs incident thereto, vou. 9			$54.28
"	"	"	Clayton E. Emig, solicitor, services in said equity cause No. 19387, as directed by said decree	$300.00	
				.....	
			Cash advanced, being retainer.	$25.00	
			Cash now due, vou. 10	275.00	
					300.00
			" due from equity cause		32.50
"	"	"	John R. Young, clerk, balance court costs, examiner's fee, in said equity cause, vou. 11		72.65
"	"	"	Edwards & Barnard, solicitors, services in said equity cause, as directed by said decree, vou. 12		200.00
25.	"	"	Register of wills, this ac., vou. 13		19.66
"	"	"	Commission on $542.82 @ 5%		27.14
					706.23
			Balance for distribution and carried over		5,584.06
				$6,290.29	$6,290.29

18	Balance brought forward.....		$5,584.06	

Said balance is now distributable in accordance with the directions of the decree in said equity cause No. 19387, as follows:

To John Taylor, son, $\frac{1}{6}$			.....	$930.67
" Isabella Smith, daughter, $\frac{1}{6}$			.....	930.67
" Matilda Ferry, " "			.....	930.67
" James Taylor, son, $\frac{1}{6}$			.....	930.67
" John L. Preinkert,	Children of a deceased daughter,	$\frac{1}{6}$	.....	465.33
" Eugene R. Preinkert,			.....	465.33
" Charlotte I. Preinkert,	Children of a deceased daughter,	$\frac{1}{6}$	.....	465.33
" Clara E. Preinkert,			.....	465.33
Fractions.....			.....	.06
			$5,584 06	$5,584 06

The above distributive shares are to be added to to the extent of $20.00, the error found in the examiner's fee as reported by the clerk in equity cause No. 19387, making $3.33 to those receiving $\frac{1}{6}$ and $1.66 to those two sets of children receiving $\frac{1}{6}$.

JOHN TAYLOR.

DISTRICT OF COLUMBIA, *To wit:*

OFFICE OF THE REGISTER OF WILLS,
January 26th, 1899.

This day appeared John Taylor, executor under the will of James Taylor, deceased, as aforesaid, and made oath on the Holy Evangels of Almighty God that the foregoing account, as stated, is just and true; that he has *bona fide* paid, or secured to be paid, the
19 several sums for which he claims credit and allowance.

Test: M. J. GRIFFITH,
[SEAL.] *Notary Public for the District of Columbia.*

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

On this 27th day of January, A. D. 1899, the foregoing account being now presented for approval, the same is, after examination by the court, approved and passed.

A. B. HAGNER, *Justice.*

And thereupon the said plaintiffs offered in evidence the judgment of said court in said cause rendered on February 20, 1900, as the same appears in Law Minutes No. 39, at folio 237, of said court; to which offer the said defendant, Thomas Blagden, by his counsel, then and there objected, because said evidence and judgment was and is incompetent, irrelevant, and inadmissible, and especially because it was rendered subsequent to the institution of this action; and the court thereupon overruled the objections of the said defendant and allowed said judgment to be read in evidence to the jury; to which ruling of the court the said defendant, Blagden, by his counsel, then and there excepted.

Said judgment is as follows, to wit:

Supreme Court of the District of Columbia.

TUESDAY, *February* 20, 1900.

The court resumes its session pursuant to adjournment,
20 Mr. Justice Bradley, presiding.

* * * * * * *

THE UNITED STATES OF AMERICA for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Guardian, Plaintiffs, *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and GEORGE W. White, Defendants.	At Law.	No. 43551.

Now come here the plaintiffs, by their attorneys, Messrs. Barnard and Johnson, and pray judgment of their demand against the defendant John Taylor, who, though served with copies of the declation, notice to plead, and summons the 19th day of December, 1899, hath not pleaded to the action. Therefore it is considered that the plaintiffs recover against said defendant eighteen hundred and sixty-seven dollars and ninety-six cents ($1,867.96), with interest, at the rate of 6% per annum, from January 27th, 1899, until paid, less the sum of one hundred and fifty dollars and ninety cents ($150.90) paid April 4th, 1899; the sum of one hundred dollars ($100) paid June 13th, 1899, and the sum of thirty-six dollars ($36) paid September 20, 1899, being the money payable by him to the plaintiffs by reason of the premises, together with their costs of suit, to be taxed by the clerk, and have execution thereof.

Thereupon the Hon. JOB BARNARD, a witness of lawful age called by and on behalf of the said plaintiffs, being duly sworn, testified as follows:

21 I am one of the plaintiffs named in this case as guardian of Eugene R. Preinkert and John L. Preinkert, infants, and I am their guardian and attorney. I was also the attorney of Charlotte Preinkert, who is the guardian of Charlotte I. Preinkert and Clara E. Preinkert, the said four infants being grandchildren and next of kin of James Taylor, deceased. I know the defendant John Taylor, the executor of the will of said James Taylor, deceased, and I am acquainted with the other parties to this suit. I know that the said four infants are entitled to the respective shares as shown by the second and final account of said John Taylor, executor, approved and passed by this court, holding a special term for orphans' court business, on the twenty-seventh day of January, A. D. 1899, which said original account I now hold in my hand and which account shows each of said four infants entitled to receive from said executor as their individual distributive shares of the estate of James Taylor,

deceased, the several sums of four hundred sixty-six and ninety-nine-hundredths dollars ($466.99), making the aggregate sum of eighteen hundred and sixty-seven and ninety-six one-hundredths dollars ($1,867.96).

I was present in the orphans' court when this second and final account of John Taylor was settled as the result of a decree in the equity court. There was a day appointed by said John Taylor, executor, for distribution of the estate, as required by law, and the account was stated in the orphans' court on that day, and at that time—I think it was on the very day the account was approved and passed by the orphans' court—said John Taylor brought into the court-room four or five hundred dollars, which he was ordered to pay to the attorneys as expenses of litigation; two hundred dollars,
22 ($200) allowed to me as attorney by this account, was paid to me by John Taylor at that time. This original, second, and final account was before us at that time, and, referring to it and exhibiting it to him, I then, as guardian of Eugene R. Preinkert and John L. Preinkert, infants, and also as the attorney of Charlotte Preinkert, the guardian of Charlotte I. Preinkert and Clara E. Preinkert, infants, and in their behalf, demanded payment from said John Taylor, executor, the said amounts due the said infants and distributed to them by said account, amounting in all to eighteen hundred and sixty-seven and $\frac{96}{100}$ dollars ($1,867.96), and on account of said indebtedness he made the following payments to me, viz., one hundred and fifty and $\frac{90}{100}$ dollars ($150.90) paid April 4th, 1899; also one hundred dollars ($100) paid June 13th, 1899; and also thirty-six dollars ($36) paid September 20th, 1899, but, although I often afterwards requested John Taylor or his attorney, Mr. Clayton E. Emig, to pay the balance due said infants on account of their distributive shares, no further payments whatever were made to me or to my knowledge to any one on behalf of said infants.

And thereupon the plaintiff called Mrs. CHARLOTTE PREINKERT, a witness of lawful age, who, being first duly sworn, testified as follows:

I am the guardian for the plaintiffs Charlotte I. and Clara E. Preinkert; that Job Barnard, who has just testified, was my attorney in the matter of the estate of James Taylor; that I know the defendant John Taylor, executor of the will of James Taylor, the grandfather of the four infant plaintiffs; that I have never received from John Taylor or any one else anything whatever on account of the distributive shares of the four plaintiffs in the estate of their grandfather.

23 And the plaintiffs then rested and announced the case closed.

At the close of the plaintiffs' evidence the defendants Thomas Blagden and George W. White, by their counsel, moved the court to instruct the jury that plaintiffs are not entitled to recover and the verdict must be in favor of said defendants:

1. Because there is no sufficient proof of breach of the bond sued on in this action to entitle the plaintiffs to recover.

2. Because there is no proof that an order of distribution was passed by said court, holding a special term for orphans' court business, on January 27th, A. D. 1899, or at any other time, directing the said John Taylor to distribute the balance alleged to remain in his hands or any amount whatever.

3. Because there is no proof that said court, holding a special term for orphans' court business, on January 27, 1899, or at any other time, passed any order requiring or directing the said John Taylor, executor, to distribute or pay any amount whatever to Job Barnard, guardian of Eugene R. Preinkert and John L. Preinkert, infants, or to Charlotte Preinkert, guardian of Charlotte I. Preinkert and Clara E. Preinkert, infants, for their or either of their use, or the several sums alleged to have been distributed to them or either of them.

4. Because there is no proof of any such notice of plaintiffs given to the defendants or left at their last place of abode, as also a copy of the nature of plaintiffs' demand, attested by the clerk and
24 as required by the statute in such case made and provided, and no proof of any order of distribution, duly certified and presented to said John Taylor, executor, or to these defendants, accompanied by demand of payment thereof.

Which said motion was by the court forthwith overruled and denied; to which ruling of the court the said defendants, by their counsel, then and there excepted.

And the said defendants declined to offer any evidence.

Each of the foregoing exceptions was duly taken by counsel for the defendant Thomas Bladgen before the jury retired to consider of their verdict and was noted upon the minutes of the court by the presiding justice while the jury were still at the bar of the court, and the counsel for the said defendant now prays the court to sign and seal this his bill of exceptions, which is accordingly done this 20th day of December, A. D. 1901, now for then, and the same is hereby made a part of the record herein.

HARRY M. CLABAUGH, *Justice.* [SEAL.]

Submitted to us this 9th day of December, 1901.

BARNARD & JOHNSON,
Attorneys for Plaintiff.

25 *Directions to Clerk for Preparation of Transcript.*

Filed Jan. 10, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA, for the Use of Eugene R. Preinkert, John L. Preinkert, Infants, by Job Barnard, Their Guardian, and Charlotte I. Preinkert, Clara E. Preinkert, Infants, by Charlotte Preinkert, Their Guardian, Plaintiff, *vs.* JOHN TAYLOR, THOMAS BLAGDEN, and George W. White, Defendants.	At Law.	No. 43551.

Order for transcript of record for the Court of Appeals of the District of Columbia.

The clerk will please make out record for the said Court of Appeals in the above-entitled cause and include in the transcript the following, viz:

1. The plaintiff's declaration.

2d. The amended pleas of the defendant Thomas Blagden, filed February 8th, 1900.

3. Plaintiff's joinder of issue and notice of trial, filed February 20th, 1900.

4. Verdict of the jury, October 15, 1901.

5. Motion for new trial, filed October 17, 1901.

6. Order overruling motion for new trial and judgment on verdict, Nov. 8, 1901.

26 7. Order of this court approving appeal bond fixed in penalty of $2,500 approved and filed, and severance on appeal granted to defendant Thomas Blagden; memorandum of appeal bond.

8. Order for appeal by said defendant, Thomas Blagden, and for citation.

9. The citation and acceptance of service thereof in behalf of appellee, Dec. 2, 1901.

10. The bill of exceptions and order making the same part of the record Dec. 20, 1901.

WM. STONE ABERT,
Attorney for Defendant and Appellant, Thomas Blagden.

27 UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 26, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 43551, at law, wherein The United States of America, for the use of Eugene R. Preinkert *et al.*, is plaintiff and John Taylor *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13 day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1167. Thomas Blagden, appellant, *vs.* The United States of America, to the use of Eugene R. Preinkert *et al.* Court of Appeals, District of Columbia. Filed Jan. 13, 1902. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1902.

No. 1167.

THOMAS BLAGDEN, APPELLANT,

vs.

THE UNITED STATES OF AMERICA FOR THE USE OF EUGENE R. PREINKERT, JOHN L. PREINKERT, INFANTS, BY JOB BARNARD, THEIR GUARDIAN, AND CHARLOTTE I. PREINKERT, CLARA E. PREINKERT, INFANTS, BY CHARLOTTE PEINKERT, THEIR GUARDIAN, APPELLEES.

BRIEF FOR APPELLANT.

WM. STONE ABERT,
Attorney for Appellant.

LAW REPORTER PRINT, WASHINGTON, D. C.

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THE UNITED STATES OF AMERICA FOR THE USE OF EUGENE R. PREINKERT, JOHN L. PREINKERT, INFANTS, BY JOB BARNARD, THEIR GUARDIAN, AND CHARLOTTE I. PREINKERT, CLARA E. PREINKERT, INFANTS, BY CHARLOTTE PEINKERT, THEIR GUARDIAN, APPELLEES.

BRIEF FOR APPELLANT.

STATEMENT.

This action was commenced on the 19th day of December, 1899, in the Supreme Court of the District of Columbia, the United States of America suing for the use of the beneficiaries above named, and alleged distributees of the estate of James Taylor, deceased, against John Taylor, Thomas Blagden and George W. White, the principal and sureties upon the bond of said John Taylor, as executor of said James Taylor, deceased, in the penal sum of $15,000.

In the declaration the plaintiff sued jointly the said John Taylor, principal, and said Thomas Blagden and George W. White, as sureties upon the statutory bond of said John Taylor, executor, bearing date on the 19th day of March, A. D. 1897, and plaintiff therein *claimed* the full sum of $1,867.96, with interest, less certain credits aggregating $286.90, besides costs.

All of the defendants were served with writ of summons.

The defendant John Taylor made no defense, and the plaintiff, on the 20th day of February, 1900, duly recovered judgment against the said John Taylor for the amount *claimed* in the declaration, to wit, $1,867.96, etc., and costs, with award of execution. The defendants Blagden and White filed a special plea of *res judicata*, to which the plaintiff demurred. The demurrer was duly heard and considered by the Circuit Court, and the demurrer of the plaintiff was sustained.

A special appeal was granted by this court to said Thomas Blagden, with severance.

The case was regularly heard and determined by this court, and the judgment of the Circuit Court on the demurrer, which also involved, in part, the sufficiency of the declaration, and was affirmed. The case is reported in the 29th volume of the Washington Law Reporter, No. 24, commencing at page 401.

In the opinion this court, in commenting upon the objections then made to the sufficiency of the declaration, other than the alleged *variance*, declared:

> "At the utmost, they suggest matters which, if true in point of fact, would, under our present simplified system of pleading, constitute points of defense by a defendant rather than of anticipation by plaintiff. We can not regard them as of importance in the present connection."

Upon the trial of the case in the Circuit Court, the jury returned a verdict in favor of the plaintiff against the said

Thomas Blagden and George W. White for $1,867.96, etc. and judgment was entered thereon for—

> "the penalty of the bond sued on herein, to wit, $15,000, said bond to be released, however, upon the payment of $1,867.96, less the credits stated," etc., (Rec., p. 6).

The case is now presented a second time to this court by the defendant Thomas Blagden, who was granted a severance by the Circuit Court.

ASSIGNMENT OF ERRORS.

It is submitted that the lower court erred:

First.

In admitting in evidence the original second and final account of said John Taylor, executor, and the record thereof (Rec., p. 10).

Second.

In admitting in evidence the judgment of the Circuit Court rendered in said cause on February 20, 1900 (Rec., pp. 12–13).

Third.

In overruling and denying the motion made on behalf of the defendant Thomas Blagden, at the close of the plaintiff's evidence, for a peremptory instruction in favor of said defendant (Rec., p. 14).

Fourth.

Because the Circuit Court had no jurisdiction to render judgment against the defendant Blagden, without proof of material conditions precedent, and especially the statutory

conditions precedent contained in the Maryland act of 1729, Ch. 25, Secs. 1 and 2 (see The Compiled Statutes, D. C., p. 70).

Fifth.

Because the Circuit Court had no jurisdiction to render judgment against the defendant Blagden, for the penalty of the bond sued on, as the plaintiff's claim set forth in the declaration is limited to the sum of $1,867.96, etc.

ARGUMENT.

The plaintiff, having failed to prove material conditions precedent, was not entitled to either verdict or judgment. And the plaintiff having wholly failed to comply with the statutory conditions precedent and requirements of the Maryland law in force in this District, the verdict and judgment should not be allowed to stand.

The subject of bonds with a penalty and especially testamentary bonds, is in part controlled by the British Statute of 8 and 9 Willliam III, Ch. 11, Sec. 8, and also the Maryland act of 1729, Ch. 25, Secs. 1 and 2, and the Maryland act of 1785, Ch. 80, Sec. 13.

See the Compiled Statutes D. C., pp. 69, 70.

The laws of the State of Maryland as they appeared upon the statute books of that State, were adopted by Congress as the law of the District of Columbia.

See act of February 27, 1801, 2 Statutes at Large, Sec. 1, pp. 104, 105.

By the Revised Statutes of the United States relating to this District, approved by Congress June 22, 1874, Congress again adopted the statute law of Maryland, as appears by Sec. 92, R. S. D. C.

See The Compiled Statutes D. C., p. 337, Sec. 2, which reads as follows:

"The laws of the State of Maryland, not inconsistent with this title, as the same existed on the 27th day of February, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District."

By such legislation, in the language of Chief Justice Marshall, the laws of Maryland "*were considered as having been re-enacted by Congress totidem verbis.*"

See United States *vs.* Simms, 1 Cranch U. S. R. 258.

It was successfully contended in the lower court that the Maryland act of 1729, Ch. 25, Secs. 1, 2, was not in force, and never became the law of the District of Columbia; and was not the law of Maryland in February, 1801.

If the trial court erred in so holding, the judgment was clearly erroneous and should be reversed.

In the compilation of the laws of Maryland in force in 1840, Mr. Clement Dorsey includes the act of 1729, Ch. 25.

See p. 77, Vol. 1, Dorsey's Laws of Maryland.

In "Thompson's Digest" of the statute laws in force in this District, this act of 1729 is also included.

This statute could not become inoperative or obsolete by non-user, as was contended in the Circuit Court.

There is nothing in the act of 1729 which is inconsistent with, or repugnant to anything contained in the Maryland act of 1798, Ch. 101. Sec. 2 of this act, p. 370 Dorsey's Laws, repeals only such former acts of the Maryland Assembly as were inconsistent or repugnant to this later act.

A different rule related to English statutes, and only those "*introduced*, used or practiced under in this State" (Maryland) were considered as previously in force.

The act of 1798 is perfectly consistent with the act of 1729 and which was in force in this District in 1901; and

by the requirements of that statute of 1729 the plaintiff could not be entitled to judgment until after the statute had been complied with, which in substance declares: That it shall not be lawful for any person or persons causing testamentary bonds to be sued, to proceed to judgment, until the party suing (described as creditor or creditors), clearly make it appear to the court what his demand is, which court may and they are hereby empowered to assess the damages *upon* the defendants having notice given *them* (whereas in this case there are three defendants) or left at their last place of abode twenty days before the court in which the plaintiffs apply for their demand to be assessed, *as also* a copy of the demand, attested by the clerk, *whereupon* it shall be lawful for such court to give judgment on such bond in the usual manner, but execution shall only issue for such sum as shall be made appear to be due.

Unless the action was brought for the penalty of the bond, the Maryland act of 1785, Ch. 80, Sec. 13, did not apply; and as in this action the plaintiff did not *claim the penalty* of the bond, the court had no jurisdiction to render judgment for that amount.

In such a case as the present, judgment could only have been rendered for the amount of the verdict (Rec., p. 4).

The judgment must be limited to the claim made in the declaration.

> City of Houston *vs.* Emery, 76 Texas Rep. 282–286.
> Hogan *vs.* Kellum, 13 Texas Rep. 399.
> Dennison *vs.* Lewis, 5 App. Cases, D. C. 328–334.

The plaintiff elected to take judgment against the principal in the bond, in this very case, and can not subsequently in the same or any other case, take a greater judgment against the surety.

> See Cage *vs.* Cassidy, 23 Howard, U. S. Rep. 109–116.
> United States *vs.* Allsbury, 4 Wallace Rep. 186.

If the action had originally been brought for the penalty of the bond, and that amount *claimed* in the declaration; if the proof was sufficient, judgment might have been rendered for the penalty, to be released upon payment of the sum of money by the verdict found to be due, as provided by Sec. 13 of the act of 1785, Ch. 80.

It is the practice in this jurisdiction when actions are brought upon bonds with a penalty, to claim the amount of the penalty in the declaration, as was done in the case of the United States *vs.* Howgate, vol. 12, Records and Briefs, Court of Appeals, D. C.

The plaintiff's sole cause of action, is the account of the executor stated by the Probate Court. No copy of that account attested by the clerk, *i. e.*, the Register of Wills, was ever presented to any of the defendants.

The register of wills was *ex-officio* clerk of the Orphan's Court, as declared by the Maryland act of 1798.

Ch. 101, Subch. 15, Sec. 9.
See also the Compiled Statutes, p. 500, Sec. 5.

The Orphan's Court was required to, and did keep a seal for said court and for the office of register of wills.

See Sec. 12 of said Act of 1798.
Also contained in Sec. 50, p. 300 of said Compiled Statutes.

The seal adopted had an eagle upon it, and the name of the Orphan's Court, Wash. Co., Dist. of Col., and was used by the register of wills as clerk of the Orphan's Court, to attest all records and copies thereof, until after said Orphan's Court was abolished. And when the powers and jurisdiction of said Orphan's Court were transferred and authorized to be exercised by the justice of the Supreme Court of the District of Columbia holding the special term for Orphan's Court business, a new seal was adopted and the same is

used to this day by the register of wills to attest all the records of his office, including, of course, accounts stated by executors.

See Act of Congress passed June 21, 1870, 16 Stats. at Large, Ch. 161, Sec. 4.
And also Sec. 47, p. 300, of Compiled Statutes, D. C.

By Sec. 931 of the Revised Statutes of the United States relating to the District of Columbia, regulating the fees to be paid to the Register of Wills, it is provided that for a copy of the account of an executor—

> "Under seal if demanded, not exceeding one hundred items, one dollar; every additional item, two cents; seal and certificate, thirty-seven and one-half cents."

See also the Compiled Statutes, p. 502.

By Sec. 929 of said Revised Statutes, D. C., the Register of Wills was required to exercise all the powers and perform all the duties which were exercised and performed by the Register of Wills of the Orphans Court, within the State of Maryland, prior to February 27, 1801.

See also the Compiled Statutes, D. C., Sec. 1, p. 500.

Thus we see that ample provision was made and in force requiring the condition precedent to be performed before judgment could be entered against a surety on an executor's bond; the mere fact that no case has been found reported in the law reports of Maryland or this District, where such a defense was ever made, or the Maryland Statute of 1729, in relation to testamentary bonds brought to an appellate court for construction, is not sufficient to justify the statute being treated as obsolete. The statute law can not become obsolete by non-user.

And there can be no repeal by non-user, unless accompanied by the enactment of irreconcilable statutes.

Tice *vs.* Shaw, 68 Md. Rep. 1.

There is a case reported in the first volume of Harris & McHenry's Rep. 210, The Lord Proprietary *vs.* Bond, where an action was instituted on a sheriff's bond, and the defendant filed the plea of the statute of limitation of five years, under Sec. 3 of the act of 1729; the plea was sustained, and the court gave judgment for the defendant. See also—

2 Harris' Entries, 405.

The presentation to the defendants of the properly attested copy of the executor's account and demand of payment, was a condition precedent to the plaintiff's right of action upon the bond sued on; and the failure to aver and prove the material conditions precedent was fatal to the plaintiff's right of recovery.

United States *vs.* Robeson, 9 Peters' Rep. 327.
Martinsburg Rwy. *vs.* March, 114 U. S. Rep. 553.
Reining *vs.* City of Buffalo, 102 N. Y. Rep. 308.
Pope *vs.* Terre Haute Co., 107 N. Y. Rep. 61.

The trial court erred in admitting the evidence of the final account and record thereof. (Rec., p. 10.)

Where a statute requires certain evidence, no other evidence can be substituted.

Sweeney *vs.* United States, 109 U. S. Rep., p. 620.

It is then part of the plaintiff's case and not matter which comes by way of defense; the defendant is not required to allege or prove a negative. The plaintiff must allege and prove the requisite condition precedent.

Monongahela Co. *vs.* Fenlon, 4 Watts & Serg. Rep., p. 212.
Ennis *vs.* O'Conner, 3 Har. & John. Rep., p. 163.
4 Ency. of Pl. & Practice, pp. 627, 643, 657, 655.

The failure to aver condition precedent may be taken advantage of at any stage of the trial.

4 Ency. of Pl. & Practice, p. 660.

The objection is not waived by failure to plead the non-performance.

Pope *vs.* Terre Haute Co., 107 N. Y. Rep. p. 61.

> "When the right of action depends upon the performance of a *condition precedent*, by the plaintiff, if the declaration omits to allege performance of it, or what is equivalent to performance, the omission is incurable by verdict."

Gould's Pleadings, p. 476, Sec. 25.

Failure to aver condition precedent is a fatal objection even after judgment by default.

McAllister *vs.* Kuhn, 96 U. S. Rep. 89.
Worsley *vs.* Wood, 6 Term Rep. 713, 719, 720.
Childress *vs.* Foster, 3 Ark. Rep. 252.
Stennel *vs.* Hogg, 1 Saunders Rep. 228a.

The lower court erred in admitting in evidence the record of the judgment rendered in this cause on February 20, 1900, against the principal, John Taylor (Rec., pp. 12–13).

Because it was not admissible and competent to introduce in evidence against a surety, a judgment rendered against the principal subsequent to the institution of the action against all the parties to the bond.

Many cases can be found where judgments rendered in actions against a principal may be used as evidence in a subsequent action against a surety to show breach of condition. As was the case in—

Moses *vs.* United States, 166 U. S. Rep. 600.

But evidence established by such judgment, rendered subsequent to action brought, would not be competent to show a breach previous to said action brought.

The best and only competent evidence in a case like the present, would be the duly certified and attested copy of the said final account served as aforesaid on the defendants, and a duly certified copy of the order of the Probate Court directing the executor to pay the amount thus shown to be due.

It has been the practice in many cases similar to the present, to treat the said order of the Probate Court, as a condition precedent, necessary to be alleged in the declaration and proved at the trial as the requisite evidence of breach of the executor's bond:

United States *vs.* Ritchie, 3 Mackey Rep. 164.
United States *vs.* Cox, 18 How. U. S. Rep. 104.
Stoval *vs.* Banks, 10 Wallace Rep. 584, 588.
Cage *vs.* Cassidy, 23 How. U. S. Rep. 114.
Ruby *vs.* State, 55 Md. Rep. 486.

The use of the term creditor in the Maryland act of 1729, relating to any person who sues upon a testamentary bond, is used in a more generic sense than the word creditor is used in the Maryland act of 1720, Ch. 24, Sec. 2. See page 8, Sec. 21, of The Compiled Statutes, D. C. The latter act is construed in the case of—

United States *vs.* Kenedy, 4 Cranch Ct. Rep. 592.

Bouvier defines the term creditor as follows:

> "He who has a right to require the fulfillment of an obligation or contract."

The principle of law decided in this Kenedy case, bears an exact analogy to the present case. Both of these statutes require the performance of a condition precedent.

The act of 1720 declares—

That it shall not be lawful for any creditor to prosecute any testamentary bond, etc., before a *non est inventus*, or a *fieri facias* returned *nulla bona*, etc., as shall, in the judgment of the court, render such creditor remediless by any other means than suing on the bond . . . and the defendants may give this act, etc., in evidence without special pleading.

In the act of 1729 it is declared: That it shall not be lawful for any person to proceed to judgment on testamentary bonds until . . . a copy of the demand, attested by the clerk, shall have been served upon the defendants; whereupon, it shall be lawful for such court to give judgment, etc.

It is submitted, that the judgment of the Circuit Court should be reversed, and a new trial should be granted.

WM. STONE ABERT,
Attorney for Appellant.

FEBRUARY 12, 1902.